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No. 98-1448

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Petitioner,
v.
THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals properly conclude that Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") is "appropriate" legislation to enforce the Fourteenth Amendment's guarantee of equal protection of the law and therefore validly abrogates state sovereign immunity from suit in federal court?

PARTIES TO THE PROCEEDING BELOW

Petitioner is the State Board of Equalization of the State of California, a defendant to the proceedings below.

Plaintiff below was The Atchison, Topeka & Santa Fe Railway Company, a former Delaware corporation with its principal place of business in Topeka, Kansas. On December 31, 1996, The Atchison, Topeka & Santa Fe Railway Company was merged with and into Burlington Northern Railroad Company, with the surviving corporation later renamed The Burlington Northern and Santa Fe Railway Company. The Burlington Northern and Santa Fe Railway Company is thus respondent in this Court. For purposes of this brief, respondent will be referred to as Santa Fe, consistent with the terminology used in the opinions below.

The California counties of Alameda, Contra Costa, Fresno, Kern, Kings, Los Angeles, Madera, Merced, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Joaquin, and Tulare, all defendants in the action below, are formally respondents here.

RULE 29.6 STATEMENT

The Burlington Northern and Santa Fe Railway Company, the corporate successor to The Atchison, Topeka & Santa Fe Railway Company, is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a Delaware Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. THE DISTRICT COURT'S JUDGMENT, WHICH WAS SUMMARILY AFFIRMED BY THE COURT OF APPEALS, RESTS ENTIRELY ON GROUNDS INDEPENDENT FROM THE QUESTION PRESENTED HERE	8
II. GRANTING THE RELIEF SOUGHT BY PETITIONER WOULD NOT END THIS LITIGATION	10
III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF SECTION 306	12
IV. TO THE EXTENT THE COURT OF APPEALS' DECISION IS BASED UPON THE CONCLUSION THAT SECTION 306 VALIDLY ABROGATED STATE SOVEREIGN IMMUNITY, IT IS CORRECT	14
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Allegheny-Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989) 12, 20
Atchison, Topeka & Santa Fe Ry. v. California State Bd. of Equalization, 102 F.3d 425 (9th Cir. 1996) 4, 9, 10
Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257 (1978) 10
Burlington Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987) 20
CSX Transp., Inc. v. Board of Pub. Works W. Va., 138 F.3d 537 (4th Cir.), *cert. denied*, 119 S. Ct. 63 (1998) 7, 11, 12
City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997) ..... *passim*
EEOC v. Wyoming, 460 U.S. 226 (1983) 19
Employment Div., Dep't of Human Resources Oregon v. Smith, 494 U.S. 872 (1990) 15
Ex parte Virginia, 100 U.S. 339 (1879) 15
Ex parte Young, 209 U.S. 123 (1908) 6, 11, 12
Green v. Mansour, 474 U.S. 64 (1985) 11
Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) 8
Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) 8, 9
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 16
Katzenbach v. Morgan, 384 U.S. 641 (1966) ..... *passim*
Nashville Chatanooga & St. Louis Ry. v. Browning, 310 U.S. 362 (1940) 21
Oregon Short Line R.R. v. Department of Revenue Oregon, 139 F.3d 1259 (9th Cir. 1998) ..... *passim*
Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 8
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) ..... *passim*
United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002 (1981) 19

TABLE OF AUTHORITIES—Continued

Page

Wheeling & Lake Erie Ry. v. Public Util. Comm'n of Pa., 141 F.3d 88 (3d Cir. 1998) 12, 13, 18
Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) .. 19

CONSTITUTION(S)

U.S. Const. amend XIV, § 5 ..... *passim*
U.S. Const. art. I, § 8, cl. 18 15

STATUTES

Pub. L. No. 94-210, § 306(2), 90 Stat. 31, 54 (1976) 20
Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501 (Supp. I 1995) ..... *passim*

LEGISLATIVE MATERIALS

S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969) 18

MISCELLANEOUS

Fed. R. App. P. 4 10
Fed. R. Civ. P. 54(b) 3
Sup. Ct. R. 10(a) 12, 13

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent The Burlington Northern & Santa Fe Railway Company ("Santa Fe") respectfully requests that this Court deny the Petition for Writ of *Certiorari* ("Petition") submitted by petitioner State Board of Equalization of the State of California.

OPINIONS AND JUDGMENTS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit in *Atchison, Topeka & Santa Fe Ry. v. California State Board of Equalization*, Nos. 98-16128, 98-16139, 98-16375, entered on November 13, 1998, was unreported and is reprinted in Appendix A to the Petition

("Pet. App."). The order and judgments of the United States District Court for the Northern District of California in *Atchison, Topeka & Santa Fe Ry. v. State Board of Equalization, et al.*, Nos. C-89-4030DLJ and C-95-3532DLJ, are not reported and are reprinted in Appendix B to the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant provisions of the United States Constitution, the Constitution of the State of California, the United States Code and the California Revenue and Tax Code are set out on pp. 2-4 of the Petition and are reprinted in Appendix D to the Petition.

STATEMENT OF THE CASE

This petition for *certiorari* presents the "second bite at the apple" of appellate review for petitioner California State Board of Equalization (the "Board"). The Board seeks review by this Court of an order of the Ninth Circuit Court of Appeals, which summarily affirmed the district court's summary judgment in favor of respondent Santa Fe declaring that the Board's assessment and collection of taxes for tax years 1991 and 1993 were foreclosed by prior orders and injunctions of the same court prohibiting those taxes. *See* Pet. App. B at 28. In its Petition, the Board raises a wholly different issue—whether Congress validly abrogated state sovereign immunity to permit railroads to sue states for discriminatory taxation practices. *See* Pet. at 9.

Santa Fe originally brought this action against the Board and sixteen California counties, challenging the assessment and collection of certain ad valorem taxes against railroad property as violative of Section 306 of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501 (Supp. I 1995) ("4-R Act"). In late

1993, the district court held a four-day trial concerning Santa Fe's claims for tax years 1989 through 1992. After conclusion of the trial, but prior to the district court's ruling, Santa Fe amended its complaint to include an identical claim for tax year 1993. Pursuant to a stipulated preliminary injunction order entered on December 2, 1993, the district court enjoined the collection of the disputed 1993 taxes "pending the determination" of the trial relating to the 1989-1992 tax years. *See Atchison, Topeka & Santa Fe Ry. v. State Bd. of Equalization California*, MCN C-81-4365, Stipulated Order for Preliminary Injunction as to 1993 Taxes of the Atchison, Topeka & Santa Fe Railway Company (N.D. Cal. Dec. 2, 1993) (reprinted in Appendix to Respondent's Brief in Opposition ("Resp. App.") at 1a, 3a).

On June 7, 1994, the district court issued an order resolving all the claims that had been tried before it, finding that the Board's taxes for tax years 1989 through 1992 violated the 4-R Act's prohibition against discriminatory taxes. *See* Resp. App. at 6a-26a. On September 7, 1994, the court entered its findings of fact and conclusions of law relating to the trial, holding, *inter alia*, that "the same legal principles set forth herein will apply to the resolution" of the 1993 tax assessments. *See id.* at 27a, 38a. On September 12, 1994, the district court entered partial judgment, pursuant to Fed. R. Civ. P. 54(b), in favor of Santa Fe with respect to tax years 1989 through 1992. *See id.* at 39a-41a.

The Board did not timely appeal this partial judgment order, nor did it timely file a post-judgment motion for relief from the judgment. Instead, the Board merely complained at a post-trial status conference that the monetary relief contained in the district court's partial judgment order was overstated. At a status conference in February 1995, the district court ordered the Board to submit a

proposed modified partial judgment with a corrected refund amount. The Board subsequently filed its proposed modified judgment, which the district court entered in April 1995. It was only then, on May 23, 1995, that the Board sought to appeal the district court's order, challenging the substance of the original partial judgment. *See* Pet. App. B at 4-5. The Ninth Circuit dismissed the appeal as untimely, concluding that, because a timely notice had not been filed, "[t]he original Partial Judgment became final when entered" on September 12, 1994. *See Atchison, Topeka & Santa Fe Ry. v. California State Bd. of Equalization*, 102 F.3d 425, 427 (9th Cir. 1996).

That ruling did not end the proceedings. On May 23, 1995, the same day it filed its untimely notice of appeal, the Board sent Santa Fe a notice of assessment for certain of Santa Fe's property for tax year 1991, even though an identical tax on the same property for the same tax year had been invalidated in the district court's September 12, 1994 order.[1] On October 4, 1995, Santa Fe filed a new lawsuit, alleging that the 1991 repeat assessment was barred by the district court's September 12, 1994 final order enjoining its assessment and collection. That action was consolidated with Santa Fe's pending challenge to the 1993 assessment—the subject of the December 2, 1993 stipulated injunction—and similar Section 306 claims brought by the Southern Pacific Transportation Company ("Southern Pacific"), Napa Valley Wine Train, Inc. ("Wine Train") and the Stockton Terminal & Eastern Railroad Company ("Stockton Terminal"). Santa Fe and Southern Pacific subsequently filed motions for leave to amend their complaints with respect to the 1993 tax assessments to add as parties the individual members of the

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[1] Indeed, the Board admitted in its answer to Santa Fe's complaint regarding this second 1991 assessment that the prior trial involved "identical parties and identical issues."

Board in their official capacities. *See* Pet. App. B at 17 & n.7.

On April 10, 1997, Santa Fe filed motions for summary judgment on its claims for relief from the 1991 and 1993 assessments. The Board simultaneously filed a motion to dismiss the claims of all the railroad plaintiffs, arguing that, in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the claims were barred by Eleventh Amendment sovereign immunity.

The district court agreed with the Board that the Eleventh Amendment barred relief under Section 306, dismissing the claims filed by Southern Pacific, Wine Train and Stockton Terminal.[2] Despite its ruling with respect to the Eleventh Amendment issue, however, the district court granted Santa Fe's motion for summary judgment, ruling that the relief sought by Santa Fe was warranted on other grounds. With respect to Santa Fe's 1991 tax year claim, the district court ruled that *Seminole Tribe* could not be applied retroactively because the district court's previous partial judgment barring an identical 1991 assessment had become final prior to the *Seminole Tribe* decision: "[B]ecause a final order and a judgment has already been entered by the Court with respect to all of the Santa Fe assessments for tax years 1989 through 1992, the Court shall grant summary judgment for Santa Fe . . . regarding the 1991 Escape Assessment." Pet. App. B at 28. "In

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[2] In response to an appeal by Southern Pacific, the Ninth Circuit summarily reversed this holding, in light of its prior ruling in *Oregon Short Line R.R. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998), that Congress validly abrogated California's sovereign immunity in federal court in enacting Section 306. The Board's petition for *certiorari* review of the Ninth Circuit's Southern Pacific decision is currently pending. *See State Bd. of Equalization California v. Southern Pac. Transp. Co.*, No. 98-584 (filed Oct. 5, 1998).

addition," the court ruled, "because the stipulated injunction with respect to tax year 1993 became permanent when the Ninth Circuit dismissed the Board's appeal, the Court grants summary judgment with respect to the 1993 . . . assessment as well." *Id.*[3] The district court subsequently denied the Board's motion to alter or amend this order.

The Board appealed the district court's summary judgment order. Subsequent to the district court's order, the Ninth Circuit decided *Oregon Short Line R.R. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998), in which it concluded that Congress validly abrogated state sovereign immunity in enacting Section 306 of the 4-R Act. On August 31, 1998, Santa Fe filed in the Ninth Circuit a motion for summary affirmance of the district court's order. The Board did not file any opposition to this motion. On November 13, 1998, a panel of the Ninth Circuit granted Santa Fe's motion without substantive comment, holding, "Appellee's unopposed motion for summary affirmance of these consolidated appeals is granted . . . . The district court judgment is affirmed." *See* Pet. App. A at 1 (citation omitted). The Board subsequently filed a timely petition for *certiorari* in this Court.

REASONS FOR DENYING THE WRIT

The Board's Petition should be denied for several reasons. *First*, while the Board asks the Court to decide whether Section 306 of the 4-R Act validly abrogates state sovereign immunity under Section 5 of the Four-

[3] Although it had granted all the relief sought by Santa Fe against the Board, the district court went on to deny the motion of Santa Fe, as well as the motion of Southern Pacific, for leave to amend their complaints to seek *Ex parte Young* relief against the individual members of the Board. *See* Pet. App. B. at 17-22.

teenth Amendment, the lower courts' orders were based on independent, alternative grounds. In a decision that was summarily affirmed by the Ninth Circuit, the district court ruled that its prior judgments regarding 1991 and 1993 tax years were final prior to the instant actions. Indeed, according to the district court, those prior judgments were final in September 1994, well before this Court's decision in *Seminole Tribe*, holding that Congress could not abrogate state sovereign immunity pursuant to its powers under the Commerce Clause. Retroactive application of the *Seminole Tribe* rule is thus inappropriate under the circumstances of this case, and the issue raised in the Board's Petition need not be decided here. Moreover, the *res judicata* and collateral estoppel issues actually addressed by the district court turn on the unique facts of this case and present no issue warranting review by this Court.

Second, granting the Board the relief it seeks here would not necessarily end this litigation because Santa Fe has sought injunctive relief against the individual members of the Board in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123 (1908). The only circuit court that has addressed this issue has affirmed the railroads' right to sue state officials pursuant to *Ex parte Young* for violations of Section 306. *See CSX Transp., Inc. v. Board of Pub. Works W. Va.*, 138 F.3d 537 (4th Cir.), *cert. denied*, 119 S. Ct. 63 (1998). That issue has not yet been addressed by the court of appeals in this case.

Third, there is, in any event, no conflict among the circuit courts of appeals that have addressed the sovereign immunity question presented in the Petition.

Finally, the Petition should be denied because, to the extent the Ninth Circuit's summary affirmance can be read to hold that Congress in Section 306 validly abro-

gated the State of California's Eleventh Amendment sovereign immunity from suit in federal court, it is consistent with this Court's jurisprudence.

I. THE DISTRICT COURT'S JUDGMENT, WHICH WAS SUMMARILY AFFIRMED BY THE COURT OF APPEALS, RESTS ENTIRELY ON GROUNDS INDEPENDENT FROM THE QUESTION PRESENTED HERE.

The primary reason for denying the Petition in this case is that, even if this Court were to grant the relief sought by the Board (*i.e.*, a holding that Section 306 does not validly abrogate California's Eleventh Amendment immunity), the lower courts' judgments rest on independent and adequate alternative grounds that are unique to this dispute. The district court's judgment, summarily affirmed without opposition from the Board or comment by the Ninth Circuit, held that its prior judgments regarding the 1991 and 1993 tax years became final when entered on September 12, 1994, as a result of the Board's failure to file a timely appeal. *See* Pet. App. B at 28. Consequently, under the district court's reasoning, application of *Seminole Tribe* to this case would constitute retroactive application of that decision to a controversy that had been finally decided before the *Seminole Tribe* decision was issued—a result that would clearly be improper. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).[4]

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[4] Prior to this Court's *Seminole Tribe* decision, this Court had held that Congress could abrogate state sovereign immunity pursuant to its Article I Commerce Clause power. *See Pennsylvania v. Union Gas*, 491 U.S. 1 (1989); *Hale v. Arizona*, 933 F.2d 1387, 1391 (9th Cir.), *cert. denied*, 510 U.S. 946 (1993). In this case, the Board does not contend that Section 306 cannot be justified as an exercise of Congress's Commerce Clause power; indeed, it argues here that Section 306 is *primarily* based on the Commerce Clause. Pet. at 10-11. Under the case law in effect at the time the issues in

The Board contends that *Harper* demands the application of the rule of *Seminole Tribe* to this case because this particular civil action was currently pending on March 27, 1996, when *Seminole Tribe* was decided. Pet. at 9-10 n.3. The Board misses the point, however. While the instant civil action was pending at the time *Seminole Tribe* was decided, the case involved adjudication of issues that had been *finally and conclusively decided* in prior litigation. In its September 12, 1994 order, the district court had concluded that the Board's 1991 assessment of Santa Fe's property violated Section 306 and thus had enjoined its collection. *See* Resp. App. at 6a-26a. Moreover, according to the district court, the stipulated preliminary injunction prohibiting the assessment and collection of the 1993 taxes became permanent as a result of the court's September 12, 1994 order. *See* Pet. App. B at 28. Both orders became final when the Board failed to file a timely notice of appeal on October 14, 1994, the 30-day deadline for filing a notice. *See Atchison, Topeka & Santa Fe Ry. v. California State Bd. of Equalization*, 102 F.3d at 427 (as result of Board's failure to appeal in timely manner, "[t]he original Partial Judgment became final when entered"). Thus, *Seminole Tribe* could not be applied retroactively to the assessment and collection of taxes for these years. *See Harper*, 509 U.S. at 97 (retroactive application of decision applies only to cases still open at the time of announcement of new rule). That result does not change simply because the Board subsequently attempted to assess an identical tax on the same property for the same tax year, as it did with the second 1991 assessment, thereby forcing Santa Fe to file another lawsuit to protect the judgment previously entered in its

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this case were finally decided, the Board's sovereign immunity defense could not have prevailed.

favor.[5] The Board cannot seek to apply *Seminole Tribe*, a decision reached more than a year after the district court's original judgment was final, simply by relitigating the precise issues previously decided.

In sum, the district court's rationale—summarily affirmed by the Ninth Circuit—principally rests on simple notions of *res judicata* and collateral estoppel.[6] To the extent that the applicability of *Seminole Tribe* is at issue at all, it is inextricably entwined with the unique facts of this case, including the *res judicata* and collateral estoppel issues on which the district court based its decision.

II. GRANTING THE RELIEF SOUGHT BY PETITIONER WOULD NOT END THIS LITIGATION.

A conclusion that Congress did not validly abrogate Eleventh Amendment immunity in enacting Section 306 would not end the inquiry regarding the permissibility of the requested injunctive relief in this case. While the case

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[5] Federal Rule of Appellate Procedure 4 provides that a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. Fed. R. App. P. 4(a). This Court has repeatedly held that this "30-day time limit is 'mandatory and jurisdictional.'" *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). Thus, as the Ninth Circuit held in this case, a judgment becomes final, as of the date of the judgment, when an aggrieved party fails to meet the 30-day jurisdictional deadline. 102 F.3d at 427. It is irrelevant that the Ninth Circuit's decision reaching this conclusion was not issued until sometime in 1996, for the court of appeals lacked jurisdiction as soon as the Board failed to appeal in a timely manner.

[6] The district court's reliance on this alternative rationale is made even more obvious by the fact that, in the same order on review here, the district court *did apply* the rule of *Seminole Tribe* to foreclose similar claims brought by Southern Pacific, Wine Train and Stockton Terminal. *See* Pet. App. B at 16. Unlike Santa Fe's claims as to 1991 and 1993 tax years, the claims of Southern Pacific and the two other railroads had not been finally decided prior to the *Seminole Tribe* decision.

was pending in the district court, Santa Fe moved to amend its complaint to add as defendants the individual members of the Board in their official capacity, seeking injunctive relief pursuant to the well-settled principles of *Ex parte Young*. While the district court denied that motion, the Court of Appeals has yet to consider the propriety of that denial, instead summarily affirming the decision of the district court, which granted relief against the Board itself.[7] Were this Court to conclude that Section 306 is not "appropriate" legislation to enforce the Equal Protection Clause and that the Board's defenses are not otherwise barred, Santa Fe would still be entitled to injunctive relief against these state officials. As this Court has held, under the *Ex parte Young* doctrine, a federal court may consider claims for injunctive relief against a state official "to prevent . . . continuing violation[s] of federal law," without running afoul of the Eleventh Amendment. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citation omitted). At least one federal court of appeals has specifically ruled that *Ex parte Young* relief is available for violations of the anti-discrimination provisions of Section 306. *See CSX Transp., Inc. v. Board of Pub. Works W. Va.*, 138 F.3d 537 (4th Cir.), *cert. denied*, 119 S. Ct. 63 (1998). Consequently, Santa Fe would still be able to obtain complete relief in this case, notwithstanding an unfavorable decision from this Court regarding the question presented by the Petition.

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[7] It is not clear why the district court addressed Santa Fe's motion for leave to amend its complaint to seek *Ex Parte Young* relief at all, since it ruled in the same order that Santa Fe's motion for summary judgment against the Board itself should be granted.

III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE CONSTITUTIONALITY OF SECTION 306.

Even apart from the serious procedural obstacles raised by the Petition, review of the decision below is also unwarranted because there is no conflict in the circuits with respect to the issue presented. *See* Sup. Ct. R. 10(a). To date, only two circuit courts of appeals have addressed the question presented by the Petition—whether, in enacting Section 306 of the 4-R Act, Congress validly abrogated state sovereign immunity pursuant to its authority to enforce the Fourteenth Amendment's guarantee of equal protection of the laws. Both courts, applying this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), have concluded that Section 306 is "appropriate" enforcement legislation under the Fourteenth Amendment and thus validly abrogates Eleventh Amendment sovereign immunity. *See Oregon Short Line R.R.*, 139 F.3d at 1266-67; *Wheeling & Lake Erie Ry. v. Public Util. Comm'n of Pa.*, 141 F.3d 88, 92-94 (3d Cir. 1998).[8]

The reasoning of both courts of appeals is remarkably similar. In *Oregon Short Line*, the Ninth Circuit held that Congress has the authority, under Section 5 of the Fourteenth Amendment, to enact legislation targeted at "taxation schemes which do not rest 'upon some reasonable consideration of difference or policy . . . .'" 139 F.3d at 1266 (citing, *inter alia, Allegheny-Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 344 (1989)). "It is just that type of unreasonable classification and discrimination," the court reasoned, "that § 11501 was de-

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[8] Because it concluded that railroads could get complete relief by suing state officials for injunctive relief pursuant to *Ex parte Young*, the Fourth Circuit expressly declined to reach the Section 5 question in *CSX Transp., Inc.*, 138 F.3d at 540 n.4.

signed to correct." *Id.* at 1267. Relying upon congressional findings that railroads were " 'easy prey for State and local tax assessors in that they are non-voting, often non-resident, targets for local taxation, who cannot easily remove themselves from the locality' " and that " 'railroads are overtaxed by at least $50 million each year'," the court held that the congressional purpose was permissible under the Equal Protection Clause. *Id.* at 1267 (citations omitted). Applying the standards of *City of Boerne*, the court held that the "statute may be regarded as an enactment to enforce the equal protection clause, is consistent with the Constitution, is adapted to its ends, and does not provide remedies that are disproportionate to the desired goal of eliminating discrimination." *Id.*

In *Wheeling*, decided only days after *Oregon Short Line*, the Third Circuit independently reached the identical conclusion: "It is evident to us that Congress recognized the potential for state and local taxing authorities to discriminate against railroads in violation of their Equal Protection rights under the Fourteenth Amendment." 141 F.3d at 93. Applying this Court's *City of Boerne* rationale, the Third Circuit concluded that the remedy enacted by Section 306 "is not out of proportion to its objective" of preventing unconstitutional discrimination against the railroads. *Id.* at 94. Thus, it upheld Section 306 as "appropriate" enforcement legislation. No court of appeals has reached a contrary conclusion. In this circumstance, there is clearly no reason for review by this Court. *See* Sup. Ct. R. 10(a).

IV. TO THE EXTENT THE COURT OF APPEALS' DECISION IS BASED UPON THE CONCLUSION THAT SECTION 306 VALIDLY ABROGATED STATE SOVEREIGN IMMUNITY, IT IS CORRECT.

The precise basis for the court of appeals' summary affirmance cannot be discerned from its order. The Board contends that the summary affirmance was based entirely upon the Ninth Circuit's prior decision in *Oregon Short Line*, that Congress validly abrogated state sovereign immunity in enacting Section 306. Pet. at 1. The district court's decision with respect to Santa Fe, however, was based entirely on *res judicata* and collateral estoppel grounds. *See* discussion *supra* Section I. Nevertheless, assuming that the Ninth Circuit's summary affirmance order stands for the proposition that Section 306 effects a valid abrogation of California's state sovereign immunity, it is perfectly consistent with this Court's jurisprudence defining the scope of congressional authority to enforce the substantive protections of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 5. For this additional reason, the petition should be denied.

After this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, congressional power to abrogate the States' sovereign immunity from suit in federal court is limited to legislation enacted under Section 5 of the Fourteenth Amendment ("Section 5"). Section 5 authorizes Congress "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5. Unquestionably encompassed within this congressional authority is the power to enforce the Amendment's guarantee of equal protection of the laws. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966).

This Court has long viewed Congress's power under the enforcement clauses of the Civil War Amendments as equally broad as congressional authority under the Nec-

essary and Proper Clause of Article I, § 8, cl. 18. *See Morgan*, 384 U.S. at 650. Shortly after the adoption of the Amendment, the Court explained the scope of congressional authority thereunder:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1879); *see also City of Boerne*, 117 S. Ct. at 2165.

The standard applied by the Court in determining whether legislation is "appropriate" under Section 5 was explained in *Katzenbach v. Morgan*, 384 U.S. at 651, and later refined in *City of Boerne*, 117 S. Ct. at 2164. The Court asks three questions in order to gauge whether legislation is "appropriate" under Section 5. First, the Court asks whether the legislation "may be regarded as an enactment to enforce" the substantive provision of the Fourteenth Amendment, such as the Equal Protection Clause. 384 U.S. at 651. Second, the Court inquires "whether it is 'plainly adapted to that end.' " *Id.* (citation omitted). Finally, the Court asks whether the legislation "is not prohibited by but is consistent with 'the letter and spirit of the constitution.' " *Id.* (footnote and citation omitted).

City of Boerne illuminated these standards. There, the Court considered whether Congress had the power to subject the States to the Religious Freedom Restoration Act ("RFRA") under Section 5. Congress enacted RFRA in response to this Court's decision in *Employment Div., Dep't of Human Resources Oregon v. Smith*, 494 U.S. 872 (1990), which held that laws of general applicability

may incidentally burden religious practices even when not supported by a compelling governmental interest. *City of Boerne*, 117 S. Ct. at 2161. In RFRA, Congress drastically altered the governing standard, instead requiring that, where a generally-applicable law places a substantial burden on the free exercise of religion, that law may survive only if justified by a compelling governmental interest and narrowly tailored to that interest. *Id.* at 2162.

The Court held that RFRA could not be justified as "appropriate" enforcement legislation under Section 5. In doing so, it expounded on the nature of Congress's "broad" power under that provision. *See id.* at 2163. In order to cross the initial threshold of permissibility under Section 5, legislation must "enforce" the provisions of the Fourteenth Amendment. *Id.* at 2164. "The Court has described this power as 'remedial.'" *Id.* That does not mean, however, that Congress is limited to enacting legislation that targets only state action previously found unconstitutional by the courts. Importantly, the *City of Boerne* Court reasoned that Congress's authority to legislate under Section 5 *extends to the prohibition of state action that is otherwise permissible under the Equal Protection Clause*:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States."

Id. at 2163 (citation omitted). Thus, so long as the legislation targets some category of unconstitutional state action, it may in the course of prohibiting that conduct also prohibit some degree of otherwise constitutional conduct. *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 279 (1997) ("Congress pursuant to its

§ 5 remedial powers under the Fourteenth Amendment may abrogate sovereign immunity, even if the resulting legislation goes beyond what is constitutionally necessary . . . ."); *Morgan*, 384 U.S. at 649 (determining appropriateness of congressional exercise of enforcement power "[w]ithout regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement").

Consequently, after *Boerne*, *Morgan*'s threshold determination of whether legislation "may be regarded as an enactment to enforce" the Fourteenth Amendment does not require a pre-enactment ruling that all of the practices prohibited by the legislation are unconstitutional. Rather, it merely requires that the legislation, as applied in some circumstances, would reach some subset of state conduct that likely would be unconstitutional. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional." *City of Boerne*, 117 S. Ct. at 2170 (emphasis added).

After determining, as a threshold matter, whether Congress has the *power* to act, *City of Boerne* next examines whether the legislative means chosen are permissible. This inquiry requires the Court to examine the proportionality of the legislation to the perceived constitutional threat. In order to fall squarely within the enforcement power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 117 S. Ct. at 2164. As part of that inquiry, the Court examines the scope of the legislation and the qualifications and limitations placed upon its applicability by Congress. If sufficiently restricted in scope, application or remedy, legislation may be valid even if it "*pervasively prohibits* con-

stitutional state action in an effort to remedy or prevent unconstitutional state action . . . ." *Id.* at 2170 (emphasis added).[9]

As applied in this case, the relevant *Morgan/City of Boerne* tests for determining "appropriateness" demonstrate that the congressional abrogation of state sovereign immunity effected by Section 306 is valid. Indeed, Section 306 is a classic case of Congress's use of its Section 5 enforcement power to remedy a violation of the Fourteenth Amendment's Equal Protection Clause. *See Wheeling*, 141 F.3d 88; *Oregon Short Line*, 139 F.3d 1259. As the lower courts have observed, Congress heard substantial evidence that States were engaging in invidious discrimination against interstate railroads: "Unfortunately, interstate carriers, especially railroads, are easy prey for State and local tax assessors. Railroads, oil pipelines, and other interstate carriers are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969). Confronted with evidence that "the railroads ha[d] been assessed more than $900 million in discriminatory taxes" during a nine-year period ending in the late 1960's, *id.* at 3, and the absence of a "plain, speedy, and efficient remedy," in state or federal courts, *id.* at 7, Congress enacted legislation providing a modest remedy—the right to sue an offending state in federal court "to prevent a violation" of the 4-R Act's pro-

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[9] *City of Boerne* ultimately held that RFRA could not survive this scrutiny. Unlike the 4-R Act, RFRA had nearly unlimited application, "ensur[ing] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 117 S. Ct. at 2170. The Court held that such a draconian remedy was not justified by the minimal constitutional threat addressed by the legislation, *i.e.*, laws of general applicability that are "enacted with the unconstitutional object of targeting religious beliefs and practices." *Id.* at 2168.

hibition against discriminatory state taxation of railroads. *See* 49 U.S.C. § 11501(c).

Congress unquestionably had the *power* to enact Section 306 under Section 5. *See City of Boerne*, 117 S. Ct. at 2164.[10] The legislation was enacted to address what Congress perceived as impermissible discrimination against a discrete class of individuals. As one court that has upheld the Act reasoned, "there can be little doubt that discriminatory state taxation can implicate equal protection concerns." *Oregon Short Line*, 139 F.3d at 1266.

Congress's goal in adopting Section 306—preventing invidious discrimination against the railroads—is clearly a legitimate Fourteenth Amendment objective. In examining state taxation practices regarding interstate railroads, Congress could have determined that state practices violate the Equal Protection Clause in numerous circumstances. First, states run afoul of the constitutional guarantee of equal protection by subjecting railroads as a class to invidious discrimination. *See Morgan*, 384 U.S. at 656 ("[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that [the challenged state law] . . . constituted an invidious discrimination in violation of the Equal Protection Clause."); *see also United States v. Uvalde Consol. Indep. Sch. Dist.*, 625

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[10] For this reason, it is irrelevant, as the Board contends, Pet. at 11, that Congress did not *expressly* rely upon its Fourteenth Amendment enforcement power in enacting Section 306. "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Congress's power to legislate under Section 5 does not depend upon the ability of congressional staff to write a persuasive brief in support of that power, but rather, upon whether Congress *could have* so acted. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) ("That does not mean . . . that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection' " in order to invoke its power).

F.2d 547, 553 (5th Cir. 1980) ("Congress's power under Section 5 of the fourteenth amendment clearly extends to protection of any group of persons invidiously discriminated against by state law . . . ."), *cert. denied*, 451 U.S. 1002 (1981).

Second, as the Ninth Circuit concluded in *Oregon Short Line*, Congress also could have determined that states violate the equal protection clause where they apply otherwise neutral state tax laws in a discriminatory manner against the railroads. *See Allegheny-Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). Thus, to the extent Section 306 addresses the unequal assessment practices of the States, its purpose is clearly legitimate under the equal protection clause.

Section 306 is also the paradigm of a proportionate legislative response to Congress's legitimate perception of unconstitutional discrimination by the States. First, Congress sought to blunt the burden that Section 306 placed upon the States by giving states a three-year grace period to bring their property taxation systems into compliance with its statutory prohibitions. *See Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 458 (1987). Second, the remedial provisions of Section 306 are narrowly tailored "to prevent[ing] a violation" of the 4-R Act's anti-discrimination provisions. 49 U.S.C. § 11501(c). Thus, railroads generally have recourse only to equitable and declaratory relief.[11] Moreover, courts are not permitted to enjoin collection or assessment of all state railroad taxes, but only the discriminatory portion of the state tax. Finally, in most cases, Section 306 permits

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[11] *See* Pub. L. No. 94-210, § 306(2), 90 Stat. 31, 54 (1976) (permitting federal courts "to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of" Section 306).

relief only where railroads can show that the assessed value of their property is at least five percent greater than similar commercial and industrial property. 49 U.S.C. § 11501(c). Thus, where there is only a minimal level of discrimination, federal courts have no power to interfere under Section 306, even if that discrimination might itself violate the Equal Protection Clause.[12]

Because Section 306 is a proportionate response to a legitimate constitutional threat—discrimination against the railroads by the States in their taxation practices—it is valid enforcement legislation under Section 5 of the Fourteenth Amendment.[13] To the extent the Ninth Circuit's summary affirmance can be read to reach this result, it is perfectly consistent with this Court's Fourteenth Amendment jurisprudence. Further review is thus unnecessary.

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[12] Because Section 306 provides such a limited remedy to railroads injured by discrimination, this Court's ruling in *Nashville Chatanooga & St. Louis Ry. v. Browning*, 310 U.S. 362 (1940), that certain disparate classification practices involving railroad property do not violate the Equal Protection Clause, does not condemn the statute. So long as Congress seeks to address some subset of unconstitutional state conduct, it can, in the process, prohibit otherwise constitutional practices, such as the disparate classifications upheld in *Browning*, provided only that the remedy is proportionate. *See City of Boerne*, 117 S. Ct. at 2163; *Morgan*, 384 U.S. at 649.

[13] Of course, in all cases, the Court must also examine the third question under *Morgan* and *City of Boerne*—whether the legislation is consistent with the letter and spirit of the constitution. *Morgan*, 384 U.S. at 651. Petitioners do not allege here, however, that Section 306 is inconsistent with some independent constitutional prohibition; thus, this issue is not separately addressed.

CONCLUSION

For the reasons stated herein, the petition for *certiorari* filed by the California State Board of Equalization should be denied.

Moreover, although the Court has recently granted *certiorari* to review three cases implicating the scope of Congress's power under Section 5 of the Fourteenth Amendment,[14] the Petition should not be held pending those decisions. Immediate denial of the Petition is appropriate in light of the unique, alternative grounds upon which the district court's ruling rested.

Respectfully submitted,

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[14] *See College Sav. Bank v. Florida Prepaid Postsecondary Expense Bd.*, No. 98-149; *Florida Prepaid Postsecondary Expense Bd. v. College Sav. Bank*, No. 98-531; *Kimel v. Florida Bd. of Regents*, Nos. 97-791, 98-796.